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Supreme Court, U.S.
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NO. 86-1822

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER THOMPSON,
Plaintiff-Appellee-Petitioner

versus

SOUTHERN PACIFIC TRANSPORTATION CO., d/b/a SOUTHERN PACIFIC RAILROAD CO., ET AL,
Defendant

and

MONSANTO CORPORATION,
Defendant-Appellant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEMLE, KELLEHER, KOHLMEYER, DENNERY, HUNLEY, MOSS & FRILOT

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17 pp

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in reversing the judgment of the District Court by finding that there was insufficient evidence of causation between Christopher Thompson's claimed exposure to dioxin and his development of the disease porphyria cutanea tarda.

TABLE OF CONTENTS

Question Presented for Review.....i
Table of Contents.....ii
Table of Authorities.....iii
Opinions Below.....1
Jurisdiction.....1
Statement of the Case.....1
Reasons for Denying the Writ.....2
Conclusion.....5
Certificate of Service.....7
APPENDIX A
Judgment of United States District Court, for the Eastern District of Louisiana, November 5, 1985.....A-1
APPENDIX B
Judgment of United States District Court for the Eastern District of Louisiana in Accordance with Mandate of United States Court of Appeals for the Fifth Circuit, March 12, 1987.....A-2
APPENDIX C
Questions Addressed by United States Court of Appeals for the Fifth Circuit to Counsel for Christopher Thompson, October 30, 1986.....A-3

TABLE OF AUTHORITIES

CASES PAGE

Boeing Company v. Shipman, 411 F.2d 365, 368-75 (5th Cir. 1969) (en banc).....3

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923).....4

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75 (1967).....3,5

Rice v. Sioux City Cemetery, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955).....4

United States v. Johnson, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925).....5

Rules

Fed.R.Civ.P. 50(b).....3

Rule 17, Rules of the Supreme Court of the United States.....4

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported in *Thompson v. Southern Pacific Transportation Co.*, 809 F.2d 1167 (1987).

The judgments of the United States District Court for the Eastern District of Louisiana are unreported and are reprinted as Appendices "A" and "B" hereof.

JURISDICTION

Jurisdiction of this Honorable Court has been invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Christopher Thompson, petitioner, filed suit in the United States Court for the Eastern District of Louisiana against Southern Pacific Transportation Co. and Monsanto Company, respondent herein, on April 17, 1981. Petitioner alleges he was exposed to dioxin at Monsanto's Luling, Louisiana plant while in the employ of Southern Pacific, which exposure he contends caused his liver disease, porphyria cutanea tarda.

After trial on the merits, the jury rendered a verdict in favor of Thompson, and against Monsanto, which verdict was made the judgment of the Court on November 5, 1985. Post-trial relief having been denied, Monsanto sought relief in the United States Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court on February 13, 1987. The Fifth Circuit, deferring fully to the jury's prerogatives in weighing the evidence and determining the credibility of witnesses, found "a lack of substantial evidence to support the verdict, for Thompson did not introduce sufficient evidence at trial to

establish a link of causation between his alleged exposure to dioxin at Luling and the development of his porphyria." *Thompson v. Southern Pacific Transportation Co.*, 809 F.2d 1167, 1168 (5th Cir. 1987).

Petitioner now seeks redress in this Honorable Court.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI IS WHOLLY WITHOUT MERIT AND REVEALS NO APPROPRIATE QUESTION WHICH ACTS AS A RECOGNIZED BASIS FOR THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION TO GRANT A WRIT OF CERTIORARI HEREIN.

Respondent, Monsanto Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this case, specifically, its opinion of February 13, 1987.

The sole question as formulated in the petition (*See* Petition at p. i) and the argument presented in support of the granting of a writ incorrectly suggests that the Fifth Circuit somehow failed to give sufficient deference to the jury's factual findings and verdict, substituting instead their own judgment to evaluate the evidence, thereby depriving the plaintiff of trial by jury.

A reading of the Fifth Circuit Opinion, however, shows clearly that the issue decided was not the correctness of the jury verdict, but rather whether or not the evidence presented at trial on behalf of the plaintiff was sufficient under the federal standard applicable in diversity

cases to allow the claim to go to the jury in the first place, or to support the verdict rendered.

Insufficiency of Evidence

The question of the sufficiency of evidence was specifically raised, briefed and decided upon by the Fifth Circuit. The decision rests squarely on the federal standard enunciated in *Boeing Company v. Shipman*, 411 F.2d 365, 368-75 (5th Cir. 1969) (*en banc*). The petition fails to raise any question of legal error and in fact acknowledges that an appellate court has the authority to reverse the lower court's denial of the defendant's motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). (*See* Petition at pp. 6-7). In fact, this Court has specifically approved of the procedural and substantive process followed by the Fifth Circuit in the present case under nearly identical circumstances in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed. 2d 75 (1967). Therefore, this petition presents no new or unresolved matters of importance which necessitate the issuance of a writ.

Since the petition fails to raise, and the record does not support, any argument that the Fifth Circuit committed any recognizable error of law, the petitioner merely argues that the appellate decision is erroneous, based on the alleged quality of the evidence presented at trial. The petition, in making any that self-serving argument, fails to supply this Court with record references on key factual points that support the argument made. Likewise, the plaintiff was unable to cite to the Appellate Court any credible, relevant evidence in the record on the causation issue when specifically requested to do so prior to and during oral argument. (*See* Appendix "C"). Therefore, the petition actually reflects the correctness of the Fifth Circuit's ruling that the plaintiff failed to meet the *Boeing* evidentiary standard, *supra*. The Fifth Circuit analyzed the record

and found that there was insufficient evidence to establish a casual link between the plaintiff's alleged exposure to dioxin and the porphyria disease.

Failure to Satisfy Requirements of Rule 17

The petition, in addition to being defective on its face in failing to clearly set forth the actual question sought to be reviewed, fails to show any appropriate grounds for the granting of a writ. None of the factors suggested in Supreme Court Rule 17 is present in this case. The petition does not seek certiorari review of any judicial conflict between a decision of this Court and a final judgment of any state or federal lower court, and clearly does not deal with a decision of a federal court of appeals in direct conflict with a decision of another appellate court on the same matter of federal law or on the same matter of general law.

Further, the petition makes no showing that the Court of Appeals departed from the accepted and usual course of judicial proceedings, and fails to raise any issue of such general importance which necessitates this Court's discretionary review. The concept of importance must, of course, relate to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1922).

Herein, there is no public agency involved; there is no statutory construction involved; there is no legal question involved; there is no numerosity involved. This case simply rests upon its own special facts and is of consequence primarily to the two litigants. Within that context, it is clear that this petition illustrates a fundamental misunderstanding of the scope of the completely discretionary certiorari powers of this Court. The purpose of writ

jurisdiction is not to give a defeated party another hearing merely because the party complains that the decision of the Court of Appeals is erroneous. As this Court has stated, "We do not grant a certiorari to review evidence and discuss particular facts." *United States v. Johnson*, 268 U.S. 220, 227, 45 S.Ct. 496, 69 L.Ed. 925 (1925). That is precisely what this petition seeks and is why denial is mandated.

No Other Grounds for Relief Exist

In asking this Court to grant certiorari, the relief which petitioner ultimately seeks is to have the sound decision of the Fifth Circuit Court of Appeals overturned and to have the trial court's judgment reinstated. Alternatively, the petition suggests in passing that the case should be remanded to the District Court for a new trial. The petition, however, does not suggest any grounds for this relief. There is no indication or argument that the record was insufficient or that any error was committed at trial to require review and the granting of a new trial. Further, it is noted that the petitioner failed to raise the issue of a "new trial" at the appellate level, nor did he seek a rehearing before the Fifth Circuit, even though that Court dismissed his claim in its entirety. Again, this Court has squarely ruled on this very point in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330, 87 S.Ct. 1072, 18 L.Ed. 2d 75 (1967). Therefore, this argument also fails to state grounds for the issuance of a writ.

CONCLUSION

The petition seeks to challenge the decision of the Fifth Circuit Court of Appeals which set aside the jury's verdict based on their finding that the evidence was insufficient as a matter of law to support the verdict. Clearly the Court of Appeals has the power to make such a determination. The petition fails to point to any legal error and

is completely devoid of any record references on key factual issues supporting the assertion that the Court of Appeals erred in finding the evidence presented to be legally insufficient. It is respectfully shown that there is no issue presented by this petition which necessitates the issuance of a writ of certiorari herein; therefore, the petition should be denied.

LEMLE, KELLEHER,
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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of this Honorable Court, hereby certify that three copies of the Opposition herein have been served upon counsel for petitioner, Daniel E. Becnel, Jr., by delivering same to his offices at 109 West Seventh Street, Post Office Drawer H, Reserve, Louisiana 70084, this 11th day of June, 1987.

_____

PAUL B. DEAL

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Nov 6 1985

CHRISTOPHER THOMPSON	CIVIL ACTION
VERSUS	NO. 81-1512
MONSANTO CORPORATION	SECTION "C"(3)

* * * * * * * * * * * * *

J U D G M E N T

The jury duly rendered its verdict accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Christopher Thompson, and against defendant, Monsanto Corporation, in the amount of $200,000.00 plus interest at the legal rate from the date of judicial demand and costs.

New Orleans, Louisiana, this 5th day of November, 1985.

LORETTA G. WHYTE, CLERK

BY: /s/ illegeble
CHIEF DEPUTY CLERK

Approved as to form:

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

Date of Entry Nov 6 1985

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Mar 12 1987

CHRISTOPHER THOMPSON — CIVIL ACTION
VERSUS — NO. 81-1512
SOUTHERN PACIFIC TRANSPORTATION CO.
d/b/a SOUTHERN PACIFIC RAILROAD CO.,
ET AL — SECTION "C"(3)

* * * * * * * * * * * * *

J U D G M E N T

In accordance with the opinion of the United States Court of Appeals issued as mandate on March 9, 1987;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendant, Monsanto Corporation, and against plaintiff, Christopher Thompson, dismissing the complaint with prejudice, at plaintiff's cost.

New Orleans, Louisiana, this 12th day of March, 1987.

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

Date of Entry Mar 12 1987

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Cricuit
October 30, 1986

TO: Counsel
SUBJECT: No. 86-3081 - Thompson v. Monsanto

After reviewing the briefs in this matter, the court had a few questions that at least one of the judges who will hear your argument knows in advance he would like to have answered or commented on in oral argument. Knowing that interruption of counsel to put these questions may interface with counsel's train of thought, and desiring also to give counsel at least some opportunity to reflect on the questions, we are submitting them to you. We suggest that you try to answer them as directly as possible during the course of your argument.

Of course, the fact that the court desires to know your answers to these questions must not be taken as an indication of the direction of the court's throughts or of the issues that the court considers decisive. Instead, they are part of the court's effort to understand the case as completely as possible.

You will likely be asked to answer other questions from members of the court as your argument proceeds. These, too, are designed merely to enable the court to understand your position. We hope that you will welcome the opportunity to give us as much information as possible.

The questions that we know at this time are the following:

For counsel for Thompson:

1. What evidence in the record indicates there was a reasonable probability that dioxin *did* cause, rather than *might* have caused, Thompson to suffer from porphyria?

2. Were the remarks mentioned on pages 24 to 29 of opposing counsel's brief proper or improper?

3. If some or all of them were improper, why is that not reason to order a new trial?

Mr. John C. Reynolds
Mr. Daniel E. Becnel, Jr.